IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 582.

CHARLES I. DAWSON, Attorney General of the Commonwealth of Kentucky, and individually, LOUISVILLE PUBLIC WAREHOUSE COMPANY, (a corporation), JOHN J. CRAIG, Auditor of the Commonwealth of Kentucky, and individually,
Appellants,

versus

THE J. & A. FREIBURG COMPANY, (Incorporated),
Appellee.

BRIEF FOR APPELLANTS.

CHAS. I. DAWSON,
Attorney General of Kentucky,
W. T. FOWLER,
Assistant Attorney General.

Westerfield-Bonte Co., Incorporated, Louisville, Ky.

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AUTHORITIES CITED.

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CHARLES I. DAWSON, ATTORNEY GENERAL OF THE COMMONWEALTH OF KENTUCKY, ET AL., - - - - - - - - - *Appellants,*

versus **BRIEF FOR APPELLANTS.**

THE J. & A. FREIBURG COMPANY (Incorporated), - - - - - - - - *Appellee.*

STATEMENT.

At the regular 1920 Session of the General Assembly of the Commonwealth of Kentucky there was passed by the Assembly, and approved by the Governor on the 12th day of March, 1920, an act entitled:

> "AN ACT imposing an annual license tax upon every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits known as whiskey or brandy or other species of double stamp spirits in this State, and upon every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in the State, and in removing same therefrom for the purpose of sale, or for any other purpose; providing for monthly reports by distilleries and bonded warehousemen, for the purpose of ascertaining the

amount of tax due; providing for monthly payments of the amount of license tax due; fixing a penalty for failure to make such monthly report and settlement; providing for the manner of distribution of the tax so collected; repealing all other license, franchise and excise taxes on the business covered by this act, and declaring an emergency to exist."

This act is quoted in full in the appendix to this brief, beginning with page 63 hereof. The act carried an emergency clause, which, under the provisions of Section 55 of the Constitution of Kentucky, made it operative immediately upon its approval by the Governor. The law required those subject to its provisions, on or before the 1st day of June, 1920, and on the first day of each month thereafter, to file reports with the Auditor of Public Accounts, showing the amount of tax due on the respective filing dates, and at the same time such reports were filed it was required that payment should be made to the Auditor of the tax due as of the respective filing dates. Before the first report provided for in the act was due, the appellee, The J. & A. Freiburg Company, filed in the District Court of the United States for the Western District of Kentucky its bill in equity against the Louisville Public Warehouse Company, John J. Craig, Auditor of the Commonwealth of Kentucky, and Charles I. Dawson, Attorney General of the Commonwealth of Kentucky, attacking the validity of this law. The bill is found on pages 2 to 17, both inclusive, of the printed transcript of the record.

It is charged in the bill that The J. & A. Freiburg Company, the appellee herein, was, prior to January 1, 1920, a wholesale liquor dealer, with its place of business in Cincinnati, Ohio; that in the course of its business it acquired title, through the purchase of negotiable warehouse receipts, to a quantity of whiskey, which, at the time of the filing of the bill, was stored in the bonded warehouse of the appellant, Louisville Public Warehouse Company, in Louisville, Kentucky; that it was desirous of transferring said liquor from the bonded warehouse in Kentucky to a public bonded warehouse in Boston, Massachusetts, and, for the purpose of effecting such removal, it tendered to the warehouse company in Kentucky all charges for storage and taxes due on same, other than the fifty-cent tax assessed by the act in question. It is alleged in the bill that the Louisville Public Warehouse Company refuses to release said whiskey for such transfer in bond, unless the fifty-cent tax provided for by the act of 1920 is also paid.

The appellants, John J. Craig, Auditor of the Commonwealth of Kentucky, and Charles I. Dawson, Attorney General of the Commonwealth of Kentucky, were made parties defendant to the bill, on the ground that they were the authorities charged with the enforcement of the law and were threatening to and would enforce same, unless enjoined and restrained by the court from so doing.

It is claimed in the bill that the appellee is not engaged in any business in Kentucky, in contempla-

tion of Section 181 of the Constitution of Kentucky, which authorizes the Legislature to impose license taxes on trades, occupations and businesses, and to impose a special or excise tax; that for the Commonwealth of Kentucky to levy or collect, in the form of a license tax or otherwise, fifty cents per proof gallon on whiskey would be to work an unjust discrimination against the owners of liquor stored in Kentucky, and would destroy and confiscate the appellee's property, and would deprive the appellee of its property without due process of law, and deny to appellee the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States; that the acts also violates the 13th section of the Bill of Rights of the Constitution of the State of Kentucky, which prohibits property being taken or applied to public use without the consent of the owner and without just compensation being previously made therefor; that it likewise violates Section 14 of the Bill of Rights of the Constitution of the State of Kentucky, which provides that the courts shall be always open and that every person, for any injury done him in his lands, goods or personal reputation, shall have remedy by due course of law; that the act, by creating a statutory lien in behalf of the Commonwealth for the amount of the tax, casts a cloud upon the title to the property of the appellee, and that, unless the appellants, the Auditor and the Attorney General, were enjoined and restrained from attempting to enforce the law, a mul-

tiplicity of suits would result, against which plaintiff would have no adequate remedy at law, and that great and irreparable injury would result to the appellee, unless the court by its injunctive process restrained the enforcement and collection of the claims, taxes and penalties provided for in the law.

In accordance with the provisions of Section 266 of the Judicial Code, after notice had been duly given, a motion was made in the District Court of the United States for the Western District of Kentucky before the Hon. A. C. Denison, Circuit Judge, and the Hon. Walter Evans and Hon. J. E. Sater, District Judges, for an interlocutory injunction, restraining the officers of Kentucky above mentioned from attempting to enforce the law. The appellants, Craig and Dawson, appeared and filed a motion to dismiss the bill, for the reason that appellee had an adequate remedy at law, and because the bill did not state facts sufficient to constitute a cause of action against them. Appellants also filed a motion to stay proceedings in the Federal Court, claiming that there was then pending in a court of the State a suit involving the validity of the statute, in which suit a stay of proceedings under the statute had been granted. This motion is found on page 40 of the transcript of record. An answer was also filed by appellants, putting in issue practically all the allegations of the bill, and pleading also the existence of an adequate remedy at law. Numerous affidavits were filed by both parties and proof taken by appellants, all of which was

directed to the question of the prohibitory nature of the tax.

The court below granted the interlocutory injunction. The opinion of the court is found on pages 126 to 153, both inclusive, of the transcript of record. and the injunction granted is found on pages 153 to 155, both inclusive, of the record. The appellants have prosecuted an appeal direct to this court, under the provisions of Section 266 of the Judicial Code.

ASSIGNMENT OF ERRORS.

The formal assignment of errors by appellants will be found on page 165 of the printed record, and, briefly enumerated, the errors complained of are as follows:

1. The court erred in granting the interlocutory injunction.

2. The court erred in holding that the act in question, and attacked in the bill, is unconstitutional and violative of the Kentucky Constitution, and especially in holding that same is void because of excessive penalties imposed for the violation thereof, and in holding that the said tax imposed is not a license or excise tax but a property tax, and in holding that the act is confiscatory and violative of the Constitution of Kentucky.

3. The court erred in refusing to stay proceedings herein pending the determination of the suit brought in the State court involving the validity of the same act.

4. The court erred in holding that equity had jurisdiction of the case, and in holding that there was no adequate remedy at law, and in holding that imminent, irreparable injury was threatened which justified the issuance of an interlocutory injunction and in holding that to enforce the collection of the tax would result in taking plaintiff's property without due process of law.

5. The court erred in refusing to sustain the motion to dismiss the bill in equity.

In this brief we will discuss the questions involved in a different order from that set out in the assignment of errors, as well as that followed by the court below in its opinion.

PLAINTIFF BELOW HAD AN ADEQUATE REMEDY AT LAW.

The universal rule in the Federal Court is that a court of equity will not allow its injunction to issue to restrain officers from the collection of taxes, except where it may be necessary to protect the rights of citizens whose property is taxed and where there is no adequate remedy by the ordinary processes of the law. The mere unconstitutionality or illegality of the law under which the tax is asserted is not sufficient to authorize the Federal Courts to use their injunctive processes to prevent the enforcement of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, produce irreparable in-

jury, or, where the property of the complainant is real estate, throw a cloud upon the title to the property of complainant and that there is no adequate remedy at law, before the aid of a court of equity may be invoked.

Judicial Code, Sec. 267.
Dow v. City of Chicago, etc., 11 Wall. 108, 20 L. Ed. 65.
Indiana Mfg. Co. v. Koehne, 188 U. S. 678, 47 L. Ed. 651.
Shelton v. Platt, 139 U. S. 591, 35 L. Ed. 273.
Allen v. Pullman Palace Car Co., 139 U. S. 658, 35 L. Ed. 303.
Boise Artesian Hot & Cold Water Co. v. Boise City, 213 U. S. 273, 53 L. Ed. 796.
Singer Sewing Machine Co. v. Benedict, 229 U. S. 478, 57 L. Ed. 1288.
Arkansas Building & Loan Ass'n v. Madden, 175 U. S. 269, 44 L. Ed. 159.

With this statement of the law, which seems to be clearly established, it is important to determine if in the case at bar the appellee has an adequate remedy at law. Sections 162 and 163 of Kentucky Statutes are as follows:

"SEC. 162. TAXES WRONGFULLY COLLECTED REFUNDED. When it shall appear to the Auditor that money has been paid into the treasury for taxes when no such taxes were in fact due, he shall issue his warrant on the treasury for such money so improperly paid, in behalf of the person who paid the same. Nothing herein contained shall authorize the issuing of any such warrant in favor of any person who may have made payment of the revenue

tax due on any tract of land, unless it is manifest that the whole of the tax due the Commonwealth on such land has been paid, independent of the mistaken payment, and ought to be reimbursed.

SEC. 163. TIME IN WHICH TAXES MAY BE REFUNDED. He shall not draw his warrant for any money improperly paid for taxes, unless application be made in each case within two years from the time when such payment was made."

The Court of Appeals of Kentucky, in construing these two sections of the statute, has held that where the tax was paid directly to the Auditor, or directly into the State Treasury, and where no part of same was due, as when same is paid where there is no warrent in the statutory law of the State for the levy or collection of such taxes, or as when same is paid under a void or unenforceable statute, or through mistake or inadvertence of the taxpayer, it is the duty of the Auditor to refund the taxes so paid. Greene, Auditor, v. Taylor, 184 Ky. 739. The last case construing these two sections of Kentucky Statutes is the case of John J. Craig, Auditor, v. Security Producing & Refining Company, decided by the Court of Appeals on November/6, 1920, and, inasmuch as it is claimed in the opinion of the lower court that there is some confusion in the opinions of the Court of Appeals of Kentucky construing these two sections of the statute, we think it advisable to quote the opinion referred to, *supra,* in full. It is as follows:

"The Security Producing and Refining Company, a corporation, was assessed by the State Tax Commission and paid into the State treasury a license tax $750.00, for the year 1918, and a like amount for the year 1919, under Sections 4189a and 4189c, Kentucky Statutes, and is now suing and is granted a mandamus by the lower court against the Auditor, requiring him to draw his warrant on the State treasury for the $1,500.-00 paid by it as tax when no license tax was due by said company at that time on this account. The Auditor is prosecuting this appeal. Section 162, Kentucky Statutes, provides 'when it shall appear to the Auditor that money has been paid into the treasury for taxes when no such taxes were in fact due, he shall issue his warrant on the treasury for such money so improperly paid, in behalf of the person who paid the same. Nothing herein contained shall authorize the issuing of any such warrant in favor of any person who may have made payment of the revenue tax due on any tract of land, unless it is manifest that the whole of the tax due the Commonwealth on such land has been paid, independent of the mistaken payment, and ought to be reimbursed.' In construing this section of the statutes we held in Greene Auditor v. Taylor, 184 Ky. 739, 'that taxes voluntarily paid to counties, cities, towns and county officers, collecting the State's revenues and other collecting officers, can not be recovered although not due, and paid under a mistake of law. City of Louisville v. Anderson, 79 Ky. 334; L. & N. R. R. Co. v. Hopkins Co., 87 Ky. 605; L. & N. R. R. Co. v. Commonwealth, 89 Ky. 531.

"It is conceded that the Security Producing & Refining Company paid, through mistake of law, the taxes for 1918 and 1919 under Sections 4189a and 4189c, when it was required to and

did pay to the State a license tax equal to one per centum of the market value of the crude petroleum produced by it. It thus paid two license taxes when it was liable for only one. When it became liable for the license tax under Section 4223c on its oil production, it was by the provisions of Section 4189a relieved of liability for a license tax upon its capital stock, but it paid both these taxes and now seeks to recover the sum paid as the latter.

"Appellee corporation insists that the attempted assessment of the taxes by the Tax Commission against the corporation was wholly without authority and, therefore, void.

"Fundamentally no tax can be levied or collected by the State, except under and by authority of legislative enactment. Money otherwise received by the State as taxes is unwarranted, and should be returned to the payor upon his compliance with the provisions of Section 163, Kentucky Statutes. It is admitted that the money sought to be recovered in this action, though paid as taxes, was not due as such, and the Security Company by mistake of law paid the same, though unwilling to do so, had it comprehended its legal rights. The attempted assessment made by the State Tax Commission was unwarranted and void because no such license tax was due at that time from the corporation. Money so paid as taxes should be returned to the payor on his timely application. The statutes, Section 162, which provides that when it shall appear to the Auditor that money has been paid into the treasury as taxes when none were in fact due, *shall* be returned to the payor was intended to cover all such cases. Such improper payment of money into the treasury as taxes can not but appear to the Auditor by a glance at the statutes. He does not have to go

into or review the attempted assessment made by the State Tax Commission, but need only to acquaint himself with the facts and look at the statutes imposing the tax on corporations to have it certainly appear to him that money has been paid into the treasury as taxes by the corporation when no such taxes were in fact due. When it does so appear to the auditor it is his duty to and he may be compelled by mandamus to issue his warrant on the treasury in repayment of the sum. In every case where money is received as taxes when not authorized by statute or in violation thereof, the duty immediately devolves on the Auditor, upon proper application by the person paying the same, to issue his warrant on the treasury in repayment of said sum to the payor. It can appear to the Auditor that money has been paid into the treasury as taxes when none are due in at least two ways: (1) When there is no warrant in the statutory law of the State for the levy or collection of such taxes; (2) when the improper and unwarranted payment is made under a void or unenforceable statute or through mistake or inadvertence of the taxpayer, directly into the treasury or to the Auditor. In either of such case it can not fail to appear to the Auditor upon proper investigation that money has been paid into the treasury as taxes when no such taxes were in fact due, and it then becomes his duty to and he *shall* issue his warrant on the treasury for the repayment of the money so improperly paid in behalf of the person who paid the same, provided proper application is made therefor. Manifestly the purpose of the Legislature in passing Section 162, *supra,* was to secure the return of all money paid into the treasury as taxes by taxpayers through mistake, inadvertence, misapprehension of the law, or under void or unen-

forceable statutes, for it expressly declares it to be the duty of the Auditor to issue his warrant in every case where it shall appear to him that the State holds money rightfully and in good conscience belonging to another.

"Following this rule, the Auditor should have promptly issued his warrant on the treasury for $1,500 in favor of appellee, Security Producing and Refining Company.

"The Auditor can not act arbitrarily in the payment of money, but will be held to strict accountability for all money paid out by him. In doubtful cases he should refuse payment until the question has been determined by the courts. But in every case, such as this, where it is made to appear to the Auditor that money has been paid into the treasury as taxes when no such taxes were in fact due, and demand has been made for its return within the time and in the manner provided by Section 163, Kentucky Statutes, he should promptly draw his warrant on the treasury and return to the payor the money thus received, but the Auditor is not required to go into or review assessments of taxing agencies to determine whether the payment is due or not.

"The cases of Bank of Commerce of Louisville v. Stone, 108 Ky. 427, and Greene, Auditor, v. Taylor, *supra;* Louisville City National Bank v. Coulter, 112 Ky. 584; County v. Bosworth, 160 Ky. 312; Louisville Gas Co. v. Bosworth, 169 Ky. 824, and all other cases announcing a similar rule, in so far as they conflict with the construction herein given Section 162, Kentucky Statutes, are expressly overruled. We can think of no reason why the State should not be required to live up to the same moral standards demanded of individuals and repay money received by it through mistake or inadvertence. Any other rule is unconscionable and is bad in

morals if not actually dishonest. The State should not merely because it has the power to declare the law, take to itself money rightfully and in good conscience belonging to its citizens and taxpayers without just return. Such a statute would be both arbitrary and unjust and we can not conceive of the great law-making department of this Commonwealth contemplating such a thing by the enactment of Section 162, Kentucky Statutes. Such a purpose, if expressed in a statute would be inimical to all the past declared public policy of the State. The lower court did not err in awarding the writ or mandamus against the Auditor compelling him to draw his warrant on the treasury in favor of the plaintiff and appellee and the judgment is affirmed."

This case was decided by the Kentucky Court of Appeals after the lower Court granted the injunction in the case at bar, and it clears up any uncertainty in the meaning of Section 162, Kentucky Statutes, that may have theretofore existed, and it has been followed in the case of Craig, Auditor, v. Frankfort Distilling Co., decided by the Court of Appeals November 23, 1920.

Now, the appellee's contention in the case at bar is that the statute under which the tax is asserted is unconstitutional and void. The Act attacked requires no action by any assessing board. By its terms the taxes are paid directly to the Auditor. The amount is figured by the taxpayer himself. Therefore, by no stretch of the imagination can it be said that the Auditor, in refunding taxes collected under the law attacked in the bill, would be required

to review the action of any other assessing body. If the taxpayer pays these taxes under protest, then certainly under the authority of the case just quoted he has the right to demand of the Auditor a warrant for the refund of these taxes, and, upon the failure of the Auditor to refund same, the taxpayer may sue the Auditor in an action at law and obtain a mandamus compelling the Auditor to perform his duty and issue his warrant for the amount of taxes wrongfully collected. In such a suit the plaintiff could set up every objection to the validity of the statute which he has set up in the suit at bar, including the Federal questions. That being true, it would seem that the appellee in the case at bar had a full, complete and adequate remedy at law. Certainly his remedy under the Statutes of Kentucky, as interpreted in the case of Craig, Auditor, v. Security Producing & Refining Company, *supra*, is as adequate and complete as were the remedies held by this Court to be adequate in many of the adjudicated cases.

In order to compare the remedy afforded to appellee by the Statutes of Kentucky, under Sections 162 and 163, with the remedies which have in various cases been held to be adequate by this Court, we deem it proper to examine the facts in a few of the cases heretofore passed upon by this Court.

One of the earliest and one of the leading cases on this question is the case of Dow v. City of Chicago, etc., 11 Wall. 108, 20 L. Ed. 65. In that case the aid of equity was invoked to prevent the collec-

tion of a tax levied by the city of Chicago on shares of the capital stock of the Union National Bank of Chicago owned by the complainant. The principal grounds alleged for the relief were that the tax lacked uniformity; that the bank shares attempted to be taxed were owned by non-residents of the State and, therefore, had no taxable situs in Chicago, and that the assessment was made without any notice to the complainant. It was claimed, of course, that the taxing authorities were threatening to sell the shares of stock and work irreparable injury upon the complainant. Objection was made by the defendant to the bill on the ground that there was an adequate remedy at law. The Court, in discussing the adequacy of the remedy at law which the complainant had, used this language:

> "If the tax was illegal, the plaintiff protesting against its enforcement might have had his action, after it was paid, against the officer or the city to recover back the money; or he might have prosecuted either for his damage. No irreparable injury would have followed to him from its collection; nor would he have been compelled to resort to a multiplicity of suits to determine his rights. His entire claim might have been embraced in a single action."

The case of Indiana Manufacturing Company v. Koehne, 188 U. S. 678, 47 L. Ed. 651, was a suit seeking to enjoin the collection of certain taxes which had been assessed against the complainant, a corporation of Indiana. It was charged that such taxes, or a

greater part of them, were illegal; that the law was in violation of the Federal Constitution, and that the taxing authorities were threatening to levy upon the property of the complainant for the purpose of collecting the tax; that its wrongful collection would lead to a multiplicity of suits, and that irreparable injury would be sustained by the complainant if the law were enforced against it. It also appears from the opinion in this case that the county authorities collected, not only the county revenue, but acted also as the collecting agency for the State's part of the tax. Under the laws of Indiana it seems that Indiana corporations are required to make a report to the assessor, showing the property of the corporation subject to the tax, and the assessor delivers such report to the county auditor, who, in turn, delivers it to a board of review, and this board values and assesses the capital stock and franchises and other property of the company for the purposes of taxation, under the law. From the action of this board the corporation assessed has the right of appeal to the State Tax Commission. Upon this appeal the State Tax Commission has the right to decide as to the assessment, and to make such an assessment, increasing or reducing it as it may decide proper, and the Auditor then certifies the action of this board to the several counties, after which the collection is made by the proper county official.

Another law of the State of Indiana provides that in case any person or corporation conceives that

he should not have paid a tax, or has been erroneously assessed, he may appear before the Board of Commissioners of the county and establish by proper proof that he has paid taxes which were wrongfully assessed against him, and it is thereby made the duty of the board to order the amount so proven to have been wrongfully collected to be refunded to the payer from the county treasury, so far as the same was paid for county taxes, and, as to that portion of same which was paid to the State, it is made the duty of the county board to certify to the Auditor the amount so proven to have been wrongfully collected, and the Auditor is then required to direct the treasurer of the State to refund same. Upon the failure of the authorities to comply with this provision of the law, the taxpayer is then given his remedy by suit.

In this case the defendant moved to dismiss the bill for want of equity, on the ground that the statute furnished to the complainant an adequate remedy at law. The Supreme Court of the United States upheld this contention and held that under this state of facts the complainant had an adequate remedy at law, and sustained the lower Court in refusing to grant the injunction. In this case the Court held that it wasn't even necessary, in order to recover the tax back which had been paid to the State, to sue the State Auditor at all; that, inasmuch as the county was made the collecting agency for the State, the suit could be brought directly against the county, and the county could not be heard to defend upon the

ground that the money had already been paid over to the State, provided notice had theretofore been given to the county that the complainant regarded the tax as illegally collected.

In the case of Shelton v. Platt, 139 U. S. 591, 35 L. Ed. 273, there was involved an Act of the Legislature of Tennessee, imposing license taxes on an express company. The claim was made that it was unconstitutional; that it interfered with interstate commerce, and was therefore violative of the Federal Constitution; that its enforcement would subject it to having its property seized by the sheriff and would greatly embarrass the company in the conduct of its interstate business, and the public served by it would be subjected to great inconvenience, and the complainant would suffer irreparable injury by the enforcement of the law. To this bill the defendants demurred on the ground that the complainant had an adequate remedy at law, and the opinion discloses that the law of Tennessee provided that in cases where the taxpayer claimed that he did not owe the taxes, he might pay under protest and then sue to recover back. The complainant claimed that this was not an adequate remedy at law. The Supreme Court, however, held that under the law of Tennessee permitting a recovery back, the complainant had a full and adequate remedy at law, and denied the injunction.

In the case of Allen v. Pullman Palace Car Company, 139 U. S. 658, 35 L. Ed. 303, the complainants

were attacking as unconstitutional a license tax which they claimed placed a burden on interstate commerce, and because they claimed it denied the taxpayer the equal protection of the law, and because it was void for repugnancy to the Constitution of the State and the Constitution of the United States. It was also alleged in the bill that in an effort to enforce the taxes against the complainant, the Pullman Palace Car Company, the sheriff of the county had seized and attached a certain sleeping car belonging to the company, and had advertised and threatened to sell same, and was threatening to seize and sell other cars. The allegation was made that this car would not sell at a forced sale for what it was worth, and, in addition thereto, the seizure of this car and the threatened seizure of other cars would hamper the company in its interstate commerce, and, in addition thereto, would destroy its power to be of adequate service to its patrons, and it would thereby be rendered liable for a multiplicity of suits by its patrons.

It would seem that a case of irreparable injury was as strongly made out as could possibly be made under the circumstances. No question was made in the lower court at all of the power of the court to grant the injunction and the lower court granted such an injunction. The question of the power of the court to grant the injunction was raised for the first time in the Supreme Court, and, notwithstanding the fact that it was raised for the first time in the Su-

preme Court, this court held that the pleadings themselves showed that the complainant was not entitled to the relief sought, and reversed the case on the ground that equity should not have granted the injunction under the circumstances, as it appeared that under the law of Tennessee the company had an adequate remedy at law to recover the value of the cars taken, and that had it wished to avoid the sale, an easy and adequate method was furnished by which it could have avoided the sale and still have sustained no loss. All it had to do was to pay the tax under protest, and then sue to recover same back.

In the case of Boise Artesian Hot & Cold Water Company v. Boise City, 213 U. S. 273, 53 L. Ed. 796, the court had under consideration the legality of an ordinance of Boise City, Idaho which imposed a license of three hundred dollars per month on a certain water company which occupied the streets and alleys of the city with its pipes, under a franchise theretofore acquired by it. The bill of complaint attacked the ordinance on the ground that it was discriminatory, and that like licenses had not been exacted of other corporations; that the city was threatening, unless the license was paid, to remove the pipes and other waterworks from the city; that it had brought suits in the State courts to recover the amounts alleged to be already due on account of the license, and would bring other suits, thereby resulting in a multiplicity of suits, and that the ordinance had cast a cloud upon the company's franchise, and

thereby depreciated the value of its property, impaired its credit and confiscated its property; that the ordinance impaired the obligation of its contract theretofore made with the city, and that the enforcement of the ordinance would take the company's property without due process of law and abridge its privileges granted by the Fourteenth Amendment, and that the ordinance violated the Constitution and laws of the State. An objection was interposed to the suit on the ground that the plaintiff had an adequate remedy at law, and the court, by Justice Moody, sustaining this contention, used this language:

> "It has been held uniformly that the illegality or unconstitutionality of a State or municipal tax or imposition is not of itself a ground for equitable relief in the courts of the United States. In such a case the aggrieved party is left to his remedy at law, when that remedy is as complete, practicable and efficient as the remedy in equity. And the rule applies as well where the right asserted is by way of defense. Phoenix Mut. L. Ins. Co. v. Bailey, 13 Wall. 616, 20 L. Ed. 501, 503.
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> "In order to give equity jurisdiction, there must be shown, in addition to the illegality or unconstitutionality of the tax or imposition, other circumstances bringing the case under some recognized head of equity jurisdiction, before the remedy of injunction can be awarded. The leading case on the subject is Dows v. Chicago, 11 Wall. 108, 20 L. Ed. 65. In that case the plaintiff sought to enjoin the collection of a tax levied upon shares of the capital stock of a national bank on the ground that the levy was

unconstitutional under the State law, and that the property was not within the jurisdiction of the State. This court declined to pass upon the validity of the tax, saying, through Mr. Justice Field (p. 109):

" 'The illegality of the tax and the threatened sale of the shares for its payment constitute of themselves alone no ground for such interposition. There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction, before the preventive remedy of injunction can be involved. It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible.' * * *"

In the case of Singer Sewing Machine Company v. Benedict, 229 U. S. 478, 57 L. Ed. 1288, the court quoted with approval the rule announced in the last case, *supra*. The Singer Sewing Machine Company case, *supra*, was a case where a New Jersey corporation was seeking to enjoin the collection of taxes levied by the city and county of Denver, in the State of Colorado, which taxes the company was claiming were not due, on the ground that it had no notice of the assessment, and the bill also contained allegations that the company had no property within the city and county other than that already returned and paid upon by it, and that the additional assessment and tax levied thereon were illegal, and that to en-

force the collection of such taxes would be violative of designated provisions of the Constitution of the United States. A demurrer was filed to the bill, on the ground that the plaintiff had an adequate remedy at law.

It appears from the opinion that Colorado had a law providing that whenever illegal taxes were collected, the county commissioners should make a refund of same to the taxpayer, and the taxpayer is given a right, upon the failure of the county commissioner to make the refund, to enforce his rights in an action at law. The court upheld the contention of defendant and denied the injunction, holding that the statute which gave the right to the taxpayer to sue to recover the taxes erroneously paid was a full and adequate remedy at law.

In the case of Arkansas Building & Loan Association v. Madden, 175 U. S. 269, 44 L. Ed. 159, the building and loan association was contesting in a court of equity the collection of a license tax by the State of Texas. It was claimed that great and irreparable injury would be suffered by the complainant if the tax were permitted to be collected, and that it would be subjected to a multiplicity of suits unless the enforcement of the law was enjoined. The court, however, Chief Justice Fuller writing the opinion, held that inasmuch as there was no law of Texas prohibiting it, the tax could be paid by the complainant under protest to the State officer whose duty it was to collect the tax, and that then suit at law might be

brough to collect this tax back from the officer collecting same, and, inasmuch as this remedy existed, it was full, complete and adequate, and that equity should not issue an injunction to restrain the enforcement of the statute.

It is suggested in the opinion of the court below that the case of *Ex parte* Young, 209 U. S. 122, 52 L. Ed. 714, is authority for granting the injunction in the case at bar. We do not so understand the Young case. In that case was involved the validity of what is known as the "Minnesota Rate Laws." That State had passed certain laws prescribing certain rates as maximum rates for passengers and certain rates as maximum rates for commodities. Heavy penalties, including penitentiary sentences, were denounced against those violating the law and charging higher rates than the maximum rates fixed by the statute. An injunction was granted, preventing the Attorney General from prosecuting complainants for a violation of the law, it being claimed that unless such injunction was granted a multiplicity of suits would result, great and irreparable injury would be suffered by the company, and to attempt to test the validity of the law in the courts would subject those testing same to heavy penalties and probable confinement in the penitentiary, if the law should be ultimately held to be good. The Attorney General disregarded this injunction, and was fined and placed in the custody of the marshal, and the case came up on a *habeas corpus* proceeding. In

that case the complainants were confronted with this situation: They must either refuse to comply with the law and thereby take a chance of going to the penitentiary and being fined if the law should be held good or they might comply with the law. In event they complied with the law, they would be absolutely without remedy to recover back the losses they sustained by operating under what was claimed to be destructively low rates, in event it should be ultimately determined in a suit that the law fixing the rates was illegal. So it clearly appeared in that case, not only that there was no adequate remedy at law available to complainants, but that they would suffer irreparable injury, no part of which could be recovered if a temporary injunction was not granted. Such is not the case here. No irreparable injury or damage will be sustained by the appellee in this case by complying with the law and then seeking his remedy under Section 162 of Kentucky Statutes. Appellee is not confronted with the danger of having great penalties inflicted upon it, nor is it confronted with the danger or chance of irreparable loss should it comply with the law and pay the tax. Appellee can avoid all danger of penalties and at the same time protect itself in whatever rights it may have. A very simple means is afforded appellee under Section 162, not only of avoiding any penalties which the law inflicts for its violation, but for getting its liquor promptly removed from Kentucky, which appellee claims it desires to do. All appellee has to

do is to pay the tax to the warehouseman under protest and remove it. When it shall have done this it is subject to no penalty and will have sustained no loss, because it may immediately, under the authority of Section 162 of the Statutes, demand of the Auditor a refund of the money, and upon his refusal may sue the Auditor and collect the same. Nor can there be any just claim that this suggested procedure will lead to a multiplicity of suits.

Appellee in its bill claims that it wants to remove all of its liquor in bond from Kentucky to Massachusetts. By paying the tax due upon this liquor before its removal, appellee can then raise in one suit against the Auditor all the questions which it urges in its bill in this case, and in one suit can recover the amount paid in taxes, should it be finally adjudged in such suit that the law is invalid. Appellee does not have to sue any other taxing agency except the Auditor, because the tax collected is all for State purposes. None of it is for local purposes, and it is all paid directly to the Auditor. No question of having to sue the county or the city or the school district is involved, because they secure no part of the tax.

The cases hereinbefore cited, especially the cases of Dow v. City of Chicago, *supra,* and Allen v. Pullman Palace Car Company, *supra,* are conclusive against the complainant's plea of irreparable injury, as these cases hold that where the statute provides a method of recovering the tax back from the collecting authority, no claim of irreparable injury will be

sustained. There is no question of a lien upon real estate in this suit, because the complainant in this case is in the unfortunate position of possessing no real estate upon which a lien may be asserted. The bill is construed most strongly against the pleader, and nowhere in the bill does it appear that complainant has any real estate in Kentucky. On the contrary, the bill affirmatively shows that the only property appellee has in Kentucky is the liquor represented by the warehouse receipts. Therefore appellee can not be heard to complain on the ground that the law casts a cloud on real estate; but even did appellee own real estate in Kentucky subject to the lien provided by the statute, that fact would be no ground for equity intervention, because Section 162 of the statute furnishes it ample means of releasing its property from lien. All it has to do is to pay the tax under protest and then any cloud upon the title to the real estate is removed.

In the case of Union Pacific Railroad Company v. Weld County, 247 U. S. 282, the court used this language:

> "And it also is immaterial that the taxes were made a lien on the company's real property, for the lien would be effectually removed by paying them and suing to recover back."

See also Allen v. Pullman Palace Car Company, 139 U. S. 658, and Arkansas Building & Loan Association v. Madden, 175 U. S. 269, 44 L. Ed. 159.

In the light of these cases we submit that the complainant has a full, complete and adequate remedy at law and that it should be remitted to this remedy. That it may be more convenient to test the validity of the law in question by an equity proceeding is no justification for such proceeding where an adequate remedy at law exists. As Chief Justice Fuller expressed it in the case of Arkansas Building & Loan Association v. Madden, 175 U. S. 269, 44 L. Ed. 159:

> "It is quite possible that in cases of this sort the validity of a law may be more conveniently tested by the party denying it by a bill in equity than by an action at law, but considerations of that character, while they may explain, do not justify the resort to that mode of proceeding."

We are especially insistent upon this contention, because we feel that appellee has attacked this law as being confiscatory without having given it any opportunity to operate at all, and, should it be remitted to its remedy at law, there has now intervened sufficient space of time to prove beyond any sort of question that the tax is not confiscatory and has in no way interfered with the removal and sale of whiskey from bonded warehouses in Kentucky.

THE PROCEEDING SHOULD HAVE BEEN ABATED.

Another reason why the temporary injunction should not have been granted is that there was at the time the injunction was granted, and there is now pending in the Franklin County Circuit Court of

Kentucky, a court which has jurisdiction to enforce the statute, a suit to test the validity of the law attacking the bill in this case. In this State suit there was a stay of proceedings, staying the Auditor and Attorney General from proceeding under the law. The record of this proceeding in the State Court is found on pages 42 to 60 of the Transcript of the Record. That the Franklin Circuit Court has jurisdiction to enforce the law in question, we assume counsel for appellee will not deny. We think the same rule which prohibits the Federal Court from using its injunctive process to stay the collection of a State tax, where there is an adequate remedy at law, holds good also in the State courts; but whether it does or does not, the temporary restraining order issued by the Clerk of the Franklin Circuit Court, staying the hands of the appellants herein is binding upon them until the restraining order is set aside. Under the law of Kentucky, it remains in full force and effect until same has been dissolved by a circuit judge upon a hearing.

Section 266 of the Judicial Code, among other things, provides as follows:

> "It is further provided that if before the final hearing of such application, a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain an

execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State."

We do not see how it can be contended that this law means other than that whenever a suit to test the validity of a law has been brought in a State court having jurisdiction to enforce the law, and a stay of proceedings has been had in that suit, then the Federal court must stay its hand until a final determination of the case in the State court. The words, "to enforce such statute or order," by every rule of grammatical construction must be held to modify the word "jurisdiction."

Counsel for appellee contend that the suit must have been brought by the State to enforce the law. Such a contention leads to an absurdity, for the reason that if the State brings a suit to enforce the law, by no possible means could a stay be had by the plaintiff in that suit. Certainly the State could not take a stay and at the same time seek to enforce the law. There would be no necessity for the defendant to have a stay, because in his answer he could defend upon all the propositions relied upon to make the law invalid, and, of course, it could not be enforced against him until those questions were finally determined. So it seems that portion of Section 266 above quoted must mean that whenever any one attacks the validity of a law in a State court, and in that attack, by injunction or restraining order, stays the hands of those charged with the enforcement of the law, that

fact of itself automatically, when made known to the Federal court, stays the hand of the Federal court.

THE TAX IMPOSED BY THE ACT IN QUESTION IS AN OCCUPATIONAL OR EXCISE TAX, AND JUSTIFIED UNDER THE KENTUCKY CONSTITUTION.

Section 181 of the Constitution of Kentucky, in so far as applicable to this case, is as follows:

> "The General Assembly may, by general law only, provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax."

This provision of the Constitution confers on the Legislature the right to put a license tax on any business for the purpose of raising revenue, or to impose a special or excise tax for that purpose. Counsel for appellee in this case are contending that the tax in question is not an occupational or excise tax, but is a tax upon property; or, if not a tax upon property, that it is an arbitrary attempt on the part of the Legislature to single out and define as a business something that was not contemplated under Section 181 of the Constitution should be treated as a business. The tax is not an *ad valorem* tax, and the Court of Appeals of Kentucky has repeatedly held that such a tax is not a property tax. The law in question in this case is almost an exact duplicate of an act passed

by the special session of the General Assembly in 1917, which imposes a license tax of two cents per gallon upon manufacturers of distilled spirits and the owners of warehouses in which such distilled spirits were stored, same to be paid upon removal from bond or upon transfer under bond from one warehouse to another. The language of the Act of 1917, in so far as applicable, is as follows:

> "Every corporation, association, company, co-partnership or individual engaged in the business or occupation of manufacturing distilled spirits known as whiskey or brandy or other species of double stamped spirits in this State, and every owner or proprietor of a bonded warehouse in this State in which such spirits are stored, shall, in addition to the taxes now imposed by law, pay to the Commonwealth of Kentucky a license tax of two cents on every proof gallon of such distilled spirits which is liable for tax to the Federal government, as shown by its official records."

This act was repealed by the law attacked in this bill. However, the Court of Appeals of Kentucky, in the case of Greene, Auditor v. Taylor & Sons, 184 Ky. 742, held that this was a license or occupational tax. The Legislature in 1917 also imposed a tax equal to one per cent of the market value of all crude petroleum produced in Kentucky, which law made the pipe line companies handling such oil the collecting agencies for the State and responsible for the tax. The Court of Appeals of Kentucky, in the case of Raydure v. Board of Supervisors of Estill County,

183 Ky. 84, held that this tax was an occupational tax. For many years we have had in Kentucky a law imposing a tax on persons engaged in rectifying whiskey, the tax being one and one-fourth cents upon every wine gallon of whiskey compounded and rectified by the persons embraced within the provisions of the act. The Supreme Court of the United States in the case of Brown-Forman Company v. Kentucky, 217 U. S. 551, 54 L. Ed. 883, held that this was an occupational tax. So that it would seem that there can be no question that the tax complained of in the bill in this case, is an occupational or an excise tax.

We think counsel for appellee are in error in contending that the Legislature has singled out as an occupation in this case the single business of owning and storing intoxicating spirits in bonded warehouses and removing same therefrom. While the law may be inaptly drawn and expressed, a reading of all of its provisions clearly indicates that it was the purpose of the Legislature to tax one continuous business, beginning with the distiller and ending with the removal of the distilled spirits from the bonded warehouse in which the distiller stored such spirits. We do not see how it can be successfully contended that the distiller under this act must pay a tax of fifty cents per gallon for manufacturing, and in addition to this tax the person who stores same in a bonded warehouse must pay another tax, and the person who removes same from the bonded warehouse must pay a third tax. The evident purpose of the Legislature

was that this entire business of distilling, owning and storing and removing from bonded warehouses should bear only the one tax as an occupational tax. The fact that a portion of the acts constituting the business had already been performed at the date of the passage of the law should in no wise affect the validity of the act. It is true as to most of the liquor reached by this tax that the act of distilling same had been performed and completed prior to the passage of the act, but it was an act subject to an occupational tax at the time the distilling was done, and the mere fact that the law may appear in a sense retroactive as to that portion of the business in no wise invalidates same, the inhibition against *ex post facto* laws applying only to criminal statutes. There is no provision in the Constitution of Kentucky nor of the United States which forbids the enactment of retrospective legislation, so long as such legislation is not an *ex post facto* statute within the meaning of the Constitution, and so long as same does not impair the obligation of a contract or interfere with vested rights.

Locke v. City of New Orleans, 4 Wall. 172, 18 L. Ed. 334.
League v. Texas, 184 U. S. 156, 46 L. Ed. 478.
Kentucky Union Co. v. Kentucky, 219 U. S. 140, 55 L. Ed. 137.
Cooley on Taxation, 3rd Edition, Vol. 1, 492.
Billings v. United States, 232 U. S. 261, 58 L. Ed. 596.

It will be observed that Section 2 of the act makes the warehouseman in which the liquors are stored the collecting agency of the State, and he is required to make the reports, showing the amount of tax due on each reporting day. No tax is required of the distiller at the time he distills his liquor and places it in a bonded warehouse. No separate tax is required of the owner and storer of liquor as long as it remains in the bonded warehouse. It is only when the liquor is removed from bond or transferred under bond out of the State that the tax becomes due, and an examination of Section 3 of the act discloses that only one tax for the entire business is to be collected, and this is measured at the rate of fifty cents for each proof gallon of liquor which is removed from bond or transferred under bond out of the State. The evident purpose of the act was to impose a tax on the one business of manufacturing distilled spirits and the preparation of same for market, and the intent of the Legislature was to make each and all of the agencies engaged in the manufacture and preparation and the handling of this liquor responsible for this one tax, the apportionment of the tax between these various agencies being left to the agencies themselves.

As a further inducement to the belief that the Legislature was attempting to impose an occupational tax on the one business—manufacturing distilled spirits and the preparation of same for commerce—we invite the court's attention to Section 8 of the act in question, which refers to persons "en-

gaged in the business covered and licensed by this act." It would seem from this language in Section 8 that the Legislature regarded the business attempted to be taxed as one business, and not as a series of occupations. Furthermore, the construction placed on the Act of 1917, which the Act in question displaces, is persuasive of our contention that the purpose was to tax only the one business. While the Act of 1917 provided in express terms that every corporation, association, company, etc., engaged in the business or occupation of manufacturing distilled spirits, *and* every owner or proprietor of a bonded warehouse in this State in which such spirits are stored, should pay a license tax of two cents on every proof gallon of such distilled spirits, the uniform construction placed upon this act by the authorities charged with its enforcement was that it imposed only one tax on the one business of distilling and storing liquors in a bonded warehouse. During all the period this law was in effect, no claim was made by the authorities charged with its enforcement that the Act of 1917 imposed a tax on the business of distilling and a separate tax on the warehouseman.

Even should the Court be of opinion, however, that our construction of this act is erroneous, and that it is not a tax on the one occupation of distilling, owning and storing in bonded warehouses, but that the Legislature was undertaking to tax the business of owning and storing in bonded warehouses as a separate business, we think the law is justified under

Section 181 of the State Constitution. Persons who store liquor in bonded warehouses do so for a certain definite purpose. One is to permit it to age, so that it may be bottled in bond and then sold to the trade. To do this, under government regulations, it must remain in storage and age for four years. This is undoubtedly doing something which is a necessary part of the business of selling liquor. Another purpose in storing liquor in a bonded warehouse is that which animates all persons who store in a public warehouse, viz.: to have some person in charge and in keeping of the goods and responsible therefor. Another reason for the storage is to avoid payment of government taxes until a sale has been secured for the product stored. It would seem that a person engaged in the liquor business to any extent would undoubtedly have to engage in these particular acts in order to so engage in business.

The appellee's bill in this case shows that it bought the liquor in question in this case at the date of its being placed in the bonded warehouse four years ago; that it has been left in the bonded warehouse for the purpose of aging. Appellee alleges in its bill that it has now become of sufficient age to make it merchantable whiskey. So that it would seem, under the protection of the Kentucky law, it has been storing its liquor in Kentucky for the definite purpose of preparing it for market and now has it stored in Kentucky ready for the market. Appellee now seeks, notwithstanding the fact that it has had the benefit of

the Kentucky law up to this date in preparing its product for the market, to withdraw it without paying tribute in any way to Kentucky for the privilege of having engaged in Kentucky in the business of preparation of its product for market.

The Legislature of Kentucky, under the Constitution of the State, has the undoubted right to single out a business and impose an occupational tax on such business, and unless the definition and selection of the business made by the Legislature is so arbitrary and capricious as to be unreasonable, the courts are not justified in declaring the act of the Legislature illegal.

In the case of Female Academy v. Sutherland, 116 Ill. Reports (Freeman), 375, the court was called upon to define the meaning of the words "doing business in this State." The court used this language:

> "Receiving lands in this State by devise, and the assertion in the State of ownership of them we regard a sufficient doing business in this State to bring appellant within the purview of this language of the section."

In the case of Pennyslvania v. Bauerle, 143 Ill. Reports, 461, the court, in construing the same statute referred to in the case above, used this language:

> "So here, receiving the land adjoining Chicago by devise, with power to sell, and dispose of same, and the power to lease it and to collect the rents and profits therefrom, and the assertion in this State of the ownership of said land and assuming to sell and convey it, and bringing

suits in the courts of this State in respect to said land and such alleged ownership, and for the enforcement of contracts in regard to same, must be held to be doing business in this State within the purview of this section."

While it is true that the two opinions just referred to were not construing a statute imposing a tax on doing business, still they illustrate how far the courts have gone in holding that certain acts constituted doing business within the State.

DO THE PENALTIES FOR VIOLATION OF THE ACT IN QUESTION MAKE IT INVALID?

The appellee claims, and the lower court found, that the penalties fixed by the act in question for its violation are so oppressive as to render the entire law invalid. The lower court justified its position in this respect upon the idea that the laws of Kentucky furnish no adequate method of testing the statute without incurring the risk of penalties, and that the penalties were so large as to serve as a practical prohibition against any one resisting the law and taking the risk of ultimately having to pay the penalties, in event the law should be held good. We think this position of the lower court, however, is without any force whatever, when the act is considered in connection with Section 162 of the statutes hereinbefore referred to. It has been heretofore shown in this brief how one may test the law in question without incurring any risk, either of penalties or of loss. It is

the universal rule that where a means is furnished by which a law can be safely tested without the person testing same incurring the penalties, in event he loses in the test, substantial penalties may be imposed. We think it safe to say that an act otherwise valid will not be held invalid on account of penalties alone, unless there exists the further fact that the person subject to the provisions of the law is afforded no means of testing same without incurring the risk of having to pay the penalties.

St. Louis, I. M. & S. Railway Co. v. Williams, *et al.*, 40 Supreme Court Rep. 71.
Waddy v. Southern Railway Co., 235 U. S. 67, 59 L. Ed. 405.
Gulf, Colorado & Santa Fe Railway Co. v. State of Texas, 246 U. S. 58, 62 L. Ed. 574.

Assuming that Section 162 of the statutes of Kentucky, hereinbefore referred to, affords an adequate and safe means of testing the act in question without incurring the risk of the penalties, it can not be said that the penalties for a violation of the act are excessive and unreasonable. The court must look to the object intended to be accomplished by the imposition of the penalties. It is evident that the act intended to make the liquor itself part security for the collection of the tax imposed by the act, and unless the penalties were heavy, the temptation would be very strong for the owners of large quantities of liquor stored in bonded warehouses in Kentucky to remove same from such warehouses between two reporting dates, without the payment of the tax, and all that

the State would have left to secure it in the tax would be a claim against the warehouseman, secured by a lien against such property as he owned and used in connection with the warehouse. Certainly, in view of this situation, the State is justified in impósing such penalties for failure to report and promptly pay the tax as would minimize the danger of having the whiskey removed without satisfying the tax for which it stands in lien.

Furthermore, we think that the section of the statute which imposes the penalties may be considered as separable, and may be adjudged to be invalid without affecting the rest of the law. While undoubtedly the Legislature considered the imposition of the penalties as an important part of the statute, as a means of collecting the tax, we do not think it can with reason be held that the Legislature regarded the penalties as so vital as that the law would not have been passed without the penalty provision.

IS THE APPELLEE DENIED THE EQUAL PROTECTION OF THE LAW GUARANTEED BY THE FOURTEENTH AMENDMENT?

The appellee claims in its bill that the State has denied to it equal protection of the law guaranteed by the Fourteenth Amendment, basing this on the idea that it places the owner of liquor stored in Kentucky at a disadvantage in competition with the owners, storers and manufacturers of liquor outside of Kentucky.

This very question was raised in the case of Brown-Forman, Company v. Kentucky, 217 U. S. 551, 54 L. Ed. 883. In that case there was involved the legality of the Act of 1906, which imposed a license tax of one and one-fourth cents per gallon upon every person engaged in the occupation of compounding, rectifying, adulterating or blending distilled spirits. One of the grounds of attack was that a like tax was not imposed upon the compounders and rectifiers conducting the business outside of Kentucky, and that the product produced by such nonresident compounders and rectifiers came in direct competition with the product of the Kentucky compounders and rectifiers, to the disadvantage of and unfair discrimination against the Kentucky rectifiers, inasmuch as the Kentucky rectifiers and blenders were paying a burden not borne by the men outside of Kentucky engaged in the same business. The plea was made that by reason of this situation the Kentucky blenders, compounders and rectifiers were denied the equal protection of the law guaranteed by the Fourteenth Amendment of the Constitution. The court discussed the case at length and reached the conclusion that, inasmuch as the business being taxed was a business conducted exclusively in Kentucky, the court could not concern itself as to whether or not it did work a discrimination in favor of persons engaged in the business outside of Kentucky; that, of course, the State could not control the business outside of its borders, and to hold that

it could not impose a burden upon the business within its borders would be to effectively deny the power of raising revenue by this method of taxation. The Fourteenth Amendment to the Federal Constitution was never intended to be distorted by any such construction as is attempted to be placed upon same in this case. The Federal Amendment was never intended to guarantee that Kentucky should give the same privileges and the same rights to its citizens, by virtue of its statutes, as the State of Illinois or some other State gives to its citizens by its statutes. If that were the construction placed upon the Fourteenth Amendment, it would necessarily follow that every State in the Union would be compelled to make its laws conform in all respects, where the rights of citizens are concerned, to the laws of other States. Whenever the law of a State applies alike to all engaged in business within its borders, then this Federal Amendment has been fully met and complied with.

IS THE TAX CONFISCATORY?

This court has repeatedly held that an act of Congress levying an excise tax will not be held invalid merely because it operates practically to prohibit the business taxed.

McCray v. United States, 195 U. S. 27, 49 L. Ed. 61.

In re License Tax Cases, 5 Wall. 463, 18 L. Ed. 497.

Pacific Insurance Co. v. Soule, 7 Wall. 433, 19 L. Ed. 95.
Austin v. Boston, 7 Wall. 694, 19 L. Ed. 224.

However, this tax is levied under the authority of Section 181 of the Kentucky Constitution, and the Court of Appeals of Kentucky in construing that section has held that an occupational or excise tax levied under this section of the State's Constitution must not be so excessive as to be prohibitive of the business taxed. It, therefore, becomes important to determine whether or not the tax imposed by the law in question is prohibitive of the occupation taxed.

The appellee in this case seeks to make capital out of the inapt use of the word "annual," occurring in the title to the Act and in Section 1 of the Act, and insists that this language imposes a tax of fifty cents per proof gallon for each proof gallon of spirits stored in a bonded warehouse for each year same may remain in such warehouse. Such is not the construction placed on the act by the authorities charged with its enforcement, and such is not the meaning of the Act. Section 3 of the Act clearly shows the real basis upon which the tax is to be collected. It simply imposes a license tax, to be measured by the number of proof gallons removed by any person affected by same from a bonded warehouse, or transferred under bond to a bonded warehouse out of Kentucky. The number of gallons is merely the criterion by which to calculate the amount of license tax due by any particular individual affected by the law. The tax

is not cumulative, and no person is required under the terms of the law to pay a license tax of fifty cents per proof gallon for each year a gallon of whiskey may remain in a bonded warehouse, but one payment of fifty cents per proof gallon, due and payable upon its removal from a bonded warehouse, or upon its transfer under bond out of the State, fully satisfies the provisions of the law.

There is no merit in the contention of counsel for appellee that this tax amounts to expropriation, because the law does not seek nor does it in actual operation appropriate to the State any part of the property which is used as a basis upon which to figure the tax. This is not one of those cases where the State is seeking to appropriate as a license a portion of the income of the person engaged in the business taxed. So those cases in which the courts have undertaken to limit the amount of income of the business which a State may legally claim as a tax have no application to this case whatever. We think the proof in this case conclusively shows that this tax is being passed on by those subject to it to the consumer, and that the consumer in the long run is the man who pays all this tax.

The affidavit of Thomas S. Jones, filed by the appellee in this case, and which is found on pages 24 and 25 of the transcript, shows that the said Jones has been a distiller for forty years, and for the past twenty years has been actively engaged in the whiskey brokerage business; that he is familiar with the

current market price of Kentucky Bourbon whiskey and with the markets therefor. From his affidavit we quote the following language:

> "* * * That the fair and reasonable sale price of distilled spirits known as whiskey, and of the Bourbon character thereof, *whether such whiskies be stored in Kentucky or in other States of the Union than Kentucky, is in bond approximately one dollar to one dollar and a quarter per proof gallon.*"

This statement in the affidavit means and can mean but one thing—that if the owner of warehouse receipts representing whiskey stored in bonded warehouses, whether in Kentucky or out of Kentucky, can secure a dollar to a dollar and a quarter per gallon therefor, he is securing a reasonable price, which necessarily means that he is making a reasonable profit.

Now, in connection with Jones' affidavit filed by appellee, we ask the court to consider the affidavit of Samuel Freedman filed by appellee, and found on pages 22, 23 and 24 of the record. We quote from his affidavit as follows:

> "I am familiar with the prices now prevailing upon distilled spirits known as Bourbon whiskey in the various markets throughout the United States, and from my own knowledge and from the best information obtainable such distilled spirits known as Bourbon whiskey, if stored in a State other than Kentucky, can be sold at a price of approximately a dollar fifty cents ($1.50) to a dollar seventy-five cents ($1.75) per gallon in bond.

"The average price obtainable for such spirits known as Bourbon whiskey, if stored in the State of Kentucky is approximately one dollar ($1.00) per gallon to dollar twenty-five cents cents ($1.25) per gallon."

We also in this connection invite the court's attention to the testimony of Alfred B. Flarsheim, another distiller, on page 106 of the record. This question was asked him on cross-examination by the attorney for the appellee:

"Q. What is the prevailing market price in the United States of Bourbon whiskey stored in bond when the sale is evidenced by the transfer of negotiable warehouse receipts?

A. For goods made in Kentucky around one dollar per gallon, some lower and some a little higher."

And again, on page 107 of the Transcript:

"Q. I did not catch your answer with reference to the prevailing market price of warehouse receipts evidencing the ownership of whiskey stored in a warehouse outside of Kentucky. State what that market price is?

A. From $1.50 to $2.00."

Now, then, if Jones in his affidavit is right when he says that a fair and reasonable price for whiskey stored in bond is a dollar to a dollar and twenty-five cents per gallon, whether stored in Kentucky or out of Kentucky, it necessarily follows, if Freedman's and Flarsheim's testimony is true, that the owners of liquor stored outside of Kentucky, when they sell their liquor in bond for a dollar and fifty cents to a

dollar and seventy-five cents per gallon, are making more than a reasonable profit. Freedman's affidavit shows that Kentucky-stored liquor is now bringing a dollar to a dollar and twenty-five cents per gallon. Therefore, reading the two affidavits of Jones and Freedman together, the owner of Kentucky stored liquor is making a profit at the prices which Freedman says are now obtainable, in spite of the imposition of the fifty-cent license tax complained of, and at the prices which Freedman says Kentucky liquors are now bringing the purchaser may buy liquor stored in Kentucky and pay, in addition to the purchase price, a license tax of fifty cents per gallon, and then the Kentucky stored liquor is costing the consumer no more than Freedman says liquor stored outside of Kentucky is now bringing, namely, one dollar and fifty cents to one dollar and seventy-five cents per gallon.

There can be but one inference drawn from this, and that is, not that this fifty-cent tax has depressed the price of Kentucky liquors, but that it has served as an excuse and furnished the opportunity for owners of liquor stored outside of Kentucky to raise their price fifty cents per gallon. If the competition exists in the sale of liquor that the interested parties in this case would have the court believe, the court knows that this fifty cents would not have been added on to the price of liquor stored outside of Kentucky, but the price would have been left at from one dollar to one dollar and twenty-five cents per gallon, which

Jones says is a fair and reasonable price. At such a price, had there been any competition in the liquor business as it now exists, of course, Kentucky liquor, having to carry the extra burden of fifty cents, would have been forced out of the market until outside stocks were exhausted. But such is not the case. In view of the fact that a purchaser of liquor can still buy Kentucky liquor at the old price of one dollar to one dollar and twenty-five cents per gallon and pay the State tax of fifty cents in addition thereto, and still have to pay no more for his liquor than he would pay for it had he bought it from a bonded warehouse located outside of Kentucky, we must reach the conclusion, not only that there is no competition in the sale of liquor, but that Kentucky-stored liquor and the conditions obtaining as to it fixes the prevailing market price of Bourbon whiskey throughout the United States. The net result of the complaint in this case, if the affidavits of Jones and Freedman and the testimony of Flarsheim are to be accepted as true, is that the owners of Kentucky-stored liquor are dissatisfied because they are not able to make the same profit as the owners of liquor stored outside of Kentucky are making, and with this complaint the courts are not concerned.

As still further proof that Jones is correct when he claims that one dollar to one dollar and twenty-five cents per proof gallon is a fair and reasonable price for bonded liquor, regardless of where it is stored, we invite the court's attention to the affidavit

of Joseph Debar filed by the appellee in this case, and found on pages 19, 20 and 21 of the Transcript of Record. On page 21 of the Record, Debar in his affidavit shows that even with the present high cost of materials and labor, whiskey can now be manufactured at a cost of from forty to fifty cents per gallon, and at the end of four years' storage may be sold at a price not exceeding seventy cents per gallon, which price would, of course, net the manufacturer a profit. This conclusively shows that Jones is entirely correct when he says that the reasonable price of such liquor runs from one dollar to one dollar and twenty-five cents per gallon. The testimony of Jones is still further supported by the affidavit of James Thompson, filed by the appellee in this case, and which is found on pages 30 and 31 of the record. In this affidavit Thompson states:

> "* * *,that at the present time the cost of production of distilled spirits known as whiskey, notwithstanding the abnormal prices of raw material, grain, cooperage and labor, is about forty-five cents per gallon; and the carrying charges upon such whiskey until it is four years of age, the period in which distillers are permitted to bottle in bond, amount to approximately twenty-five cents per gallon."

Of course, if Thompson and Debar are correct in their estimate of the present cost of manufacturing liquor, its cost was considerably less at the time most of the liquor now in bond was manufactured. But all of this testimony produced by the appellee in this

case, and all from the mouth of interested witnesses —distillers and the owners of liquor—conclusively shows that the price of one dollar to one dollar and twenty-five cents per gallon for liquor stored in bond is a reasonable price, at which a profit may be made. That the Kentucky distillers and the owners of Kentucky-stored liquor are now able to get from one dollar to one dollar and twenty-five cents per gallon for Kentucky-stored whiskey, when sold through the medium of warehouse receipts, there can be no doubt from any of the proof in this case. Freedman swears it; Alfred B. Flarsheim, a distiller, swears it (see page 106 of the Record), and this same Flarsheim, on page 104 of the Record, swears that he is getting for his liquor stored in Kentucky around a dollar and forty cents per gallon. William J. Gorman, another distiller (page 88 of the record) swears that he is getting around a dollar to a dollar and ten cents per gallon. It will be borne in mind that all these prices referred to in the sale of warehouse receipts require the purchaser to pay, in addition thereto, all taxes, including the fifty-cent tax complained of in the bill.

In view of this proof, how utterly foolish is the claim of interested liquor dealers that they have been compelled to reduce the price of their product since the imposition of the fifty-cent tax. To illustrate the deceit attempted to be practiced in this case by the distillers, we invite the court's attention to the statement of William J. Gorman (page 86 of the Record),

in which he states that prior to the imposition of the fifty-cent tax, his concern was selling bottled-in-bond goods, all carriage charges and taxes paid, at thirty dollars a case, and that since the imposition of the fifty-cent tax he has been compelled to reduce that price to twenty-five dollars a case and then to twenty-two dollars a case. We are unable to understand why any reduction should have been made in the prices of the liquor to the consumer, if, as Gorman states, he was selling it free of any tax charge. The net result of Gorman's statement is that because he has been compelled to pay fifty cents per gallon more than he formerly paid, the consumer who buys the liquor taxpaid when the goods are sold by the case is now able to purchase the liquor at five dollars a case less than formerly.

We think this proof conclusively shows that the claim of appellee that this tax is destructive and prohibitive of the business is absolutely untrue. It appears from the testimony of Alfred B. Flarsheim (page 106 of the Transcript of Record) that his concern is now selling the product of its distillery at an average of about nineteen dollars and forty cents per case, bottled in bond. This price includes all carriage and storage charges, government taxes and State taxes, including the fifty-cent license tax imposed by the act in question. Flarsheim testifies that at this price his concern is making a profit and a little figuring by the court, based upon the testimony in this case, shows that he is undoubtedly making a big

profit. The government tax on this whiskey is two dollars and twenty cents; the State license tax is fifty cents. According to the testimony of William J. Gorman (page 92 of the Record), the State *ad valorem* tax, including the local *ad valorem* tax, storage charges, insurance charges and interest charges on the original investment, would amount to about six cents per gallon per year. In order to be on the side of absolute safety, however, we will figure these charges at the rate of ten cents per gallon per year, or for five years, assuming that to be the average age at which whiskey is removed from bond, this would amount to fifty cents, making a total of three dollars and twenty cents to cover government tax, State license tax, insurance charges, interest charges, storage charges and State and local *ad valorem* taxes.

It is further shown by William J. Gorman (page 95 of the Record) that at the present cost of labor and material, it costs about four dollars to bottle in pints a case of whiskey, exclusive of the warehouse charges, taxes, etc. As there are three gallons of whiskey in a case, this charge would amount to a dollar and thirty-three cents per gallon, making a total cost of all the items enumerated of four dollars and fifty-three cents, without accounting for loss by evaporation. On page 91 of the Record, Gorman testifies that in seven years a barrel of whiskey would lose by evaporation about thirteen and a half gallons. This is equivalent, in a barrel of fifty gallons, to an evaporation of about two gallons per year. In

other words, there is an average evaporation of one twenty-fifth of the contents per year. In five years, the period we are figuring on, it would result in an evaporation and loss of one-fifth of the total contents. If the testimony hereinbefore referred to is true, that the original cost of the liquor was fifty cents per gallon, or even putting it as high as seventy-five cents per gallon, this loss on a gallon in five years would amount to only fifteen cents, which, when added to the four dollars and fifty-three cents, would make a total cost, including every conceivable item, of four dollars and sixty-eight cents per gallon. At the selling price of nineteen dollars and forty cents, the lowest price quoted, the owner of the liquor would realize a gross price of six dollars and forty-six cents per gallon, and after deducting the four dollars and sixty-eight cents, the total cost, there would be a net price realized by the dealer of one dollar and eighty-eight cents per gallon, after taking into account every item of cost, other than the original cost of the liquor itself, which, figured at fifty cents, would leave a clean net profit of one dollar and thirty-eight cents per gallon.

There is nothing to prevent any person owning warehouse receipts, or any person owning liquor stored in a bonded warehouse, from having his liquor bottled in bond and sold in the manner indicated, and if he is not satisfied with the reasonable profit received in selling his warehouse receipts at from one dollar to one dollar and twenty-five cents per gallon,

which Jones says is a reasonable price, he may resort to the last method indicated above and make a profit that ought to satisfy the wildest dreams of avarice. Nor is he even confined to the price fixed by Jones for the warehouse receipts, nor to the price of case goods as fixed by Flarsheim.

Of course, the main market for whiskey under present conditions is found in drug stores handling same for medicinal purposes. The affidavits in this case show very clearly what druggists are paying to wholesale liquor dealers and distillers for the whiskey which they dispense under present Federal and State regulations. These affidavits, found on pages 34, 35, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81 and 82 of the Transcript of Record as well as the exhibits in the form of price lists filed with same show conclusively that bottled-in-bond case goods were selling at the time the record was made up at from twenty-one dollars per case, containing three gallons, to as high as thirty dollars per case, and the court will observe that most of these quotations are on Kentucky whiskey. Of course, these prices include all taxes, storage, interest and insurance charges. These same affidavits disclose that whiskey in bulk was selling during the same period at from five dollars to six dollars and fifty cents per gallon, which price likewise included all taxes, storage, insurance and interest charges. These affidavits likewise show that warehouse receipts were quoted by jobbers and wholesalers to the drug trade at from one dollar and fifty

cents to one dollar and sixty-five cents per gallon. (Page 35, Transcript of Record.)

So that, in addition to his ability to secure the prevailing market price of warehouse receipts representing liquor stored in Kentucky, namely, a dollar to a dollar and a quarter per gallon, and his ability to bottle same in bond and sell it at a price around nineteen dollars per case, it will be observed that the owner of liquor stored in bonded warehouses in Kentucky has an opportunity to bottle same in bond and sell it direct to the drug trade at prices ranging from twenty-one to thirty dollars per case, making a still greater profit than the price referred to by Flarsheim. Or, he may sell it in bulk to consumers authorized to use it at the prevailing prices quoted to druggists of from five dollars to six dollars and fifty cents per gallon and make a nice profit. The holder of warehouse receipts has no right to claim any better position for himself than the original owner and vendor of these receipts—the distiller. But looking at the matter either from the standpoint of the distiller or the person who owns the warehouse receipts, this record conclusively shows that the tax imposed by this law has not prohibited the business nor taken the profit out of the business. It has simply permitted outside owners to get a bigger profit than the owners of Kentucky stored liquor.

As a still further evidence that this tax has not prevented the movement of Kentucky stored whiskey, we invite the Court's attention to the affidavit of El-

wood Hamilton, Collector of Internal Revenue of Kentucky, which is found on page 35 of the record. The records of his office, as shown by his affidavit, show that more whiskey has been taxpaid and moved out of Kentucky bonded warehouses to *bona fide* purchasers since this law became effective than was moved for like periods in the months immediately preceding the effective date of the law. This affidavit shows that from the 16th day of January, 1920, up to the 1st day of February, only 15,464.3 gallons of whiskey were removed and taxpaid from bonded warehouses in Kentucky. January 16th is fixed as a starting point because immediately prior to the 16th day of January a great quantity of liquor was shipped from Kentucky for export before the exportation for beverage purposes was prohibited, and that which has moved since the 16th day of January has been moved only for the purposes for which whiskey may now be moved, or, at least, that is the presumption. This affidavit shows that in February, 1920, 121,226.6 gallons of whiskey were tax paid and removed from bonded warehouses in Kentucky, while from the 12th day of March, 1920, up to and including the 31st day of March, 1920, 165,084.3 gallons of whiskey were taxpaid and removed from bonded warehouses in Kentucky. This was the first period during which the fifty cent tax law operated, the law becoming effective March 12, 1920. These figures show that in the nineteen days of March, 40,000 gallons or more of whiskey were moved under the fifty-cent tax law than were moved in the entire period

of February before the law became operative, and in the month of April, 1920, notwithstanding the fact that the record shows that from the 13th to the 23rd day of April, 1920, no shipments were received by the railroads, on account of the embargo and strike troubles (page 69 Record) 254,159.3 gallons of whiskey were tax-paid and removed from bonded warehouses in Kentucky—more than double the amount that was removed for the entire month of February immediately preceding the effective date of the law.

In addition to these facts, it will be observed by the opinion of the lower court in this case that other distillers and owners of liquor were permitted and invited by the lower court to intervene in the case at bar, in event they desired to attack the legality of the fifty-cent tax law, and, while this record does not disclose it, practically all of the distillers in Kentucky have intervened, either in this suit or in the companion suit, 439, now pending in this court. Each of these litigants secured temporary injunctions, and the order granting them injunctions required that on each reporting date fixed by the statute, namely, the first day of each month, while said injunctions were in force, the distillers, enjoying the protection of these injunctions, should file reports with the clerk of the court and with the Auditor of Public Accounts, showing the amount of whiskey which had been disposed of up to the reporting date and execute bond to secure the ultimate payment of same, should the ultimate payment be adjudged. Of course, we know that on all the whiskey which has

been moved and sold to the trade under the protection of these injunctions the fifty-cent tax was collected from the consumer, and, while the record does not show this fact, as it was brought up before these figures were available, it is a matter of record in the lower court, which counsel for appellee will not dispute, that there has been moved from bonded warehouses in Kentucky since March 12, 1920, the effective date of the law, and up to the 1st day of November, 1920, the enormous sum of approximately 4,000,000 gallons.

In the face of this record of sales and removals which have been made by the appellee herein and others seeking to invalidate this law, we do not see how with good grace they can ask this court to say that the law has proven prohibitive of the business. The court can not conjecture on this proposition of whether or not the tax is confiscatory and prohibitive of the business. The burden is upon the appellee to make out its case by clear and unmistakable proof. It is only when by the clearest proof it is established that the law is confiscatory that the court should interfere with same. Even if the law should prohibit some particular person from engaging in the business, that of itself would not render the law invalid. It must be prohibitive of the business as a whole. The court can not single out isolated cases where it works an undue hardship and thereby say the tax is prohibitive. This principle is well settled by the courts of Kentucky in construing Section 181 of the Constitution.

In the case of City v. Sagalowski & Son, 136 Ky. 324, the Court of Appeals used this language:

> "Instances might be cited, and could be easily imagined, where any license tax of enough moment to meet the requirements of its enactment bear so heavily on certain individuals as to be severely onerous, perhaps oppressive, yet no tax or other rule is to be tested by its exceptions alone. The test is whether the tax bears so heavily on the class, not isolated and exceptional individuals, as to prohibit the occupation and be confiscatory."

This court, if it should be of opinion that we are in error in our contention that the appellee has an adequate remedy at law, and if we are in error that the cause should have been abated, should not hold this law invalid on the ground of it being confiscatory, until it has been given a fair test. The proof in this case, when carefully examined, not only fails to show the confiscatory nature of this tax, but affirmatively shows that it is not confiscatory, and the record of removals and sales made since the injunction in this case was granted belies every claim of appellee that whiskey men in Kentucky can not do business when burdened with this tax. The truth of the matter is that this record shows, since the passage and effective date of this law, that those persons having liquor stored outside of Kentucky have taken advantage of the situation and raised their price fifty cents to seventy-five cents per gallon, and when this case is sifted to its bottom it demonstrates the propo-

sition that the appellee, having enjoyed the protection of Kentucky law for its product for four years, now seeks to withdraw it from Kentucky and take it into Massachusetts and there sell same at an increased price and with an added profit, which has been brought about solely by the operation of the law of which he complains.

In conclusion, we submit:

1st. That there is no equity in the bill; that the appellee has a plain, simple, speedy and adequate remedy at law, and, under the well-established principles, time and again announced by this court it should not be allowed to stay and embarrass the collecting agencies of the State under these conditions.

2nd. That the pendency of the proceedings in the State court, accompanied by a stay of proceedings, requires that the Federal court stay its hand until the final determination of the issues in the State court.

3rd. If the court is not impressed with either of these contentions, then we submit that the claim of appellee that this law is prohibitive of its business falls to the ground, in the light of the proof in the case, and that upon the whole record there exists no real ground or fact upon which it may be claimed that any right secured to the appellee by the Federal Constitution has been denied it.

All of which is respectfully submitted.

CHAS. I. DAWSON,
Attorney General.

W. T. FOWLER,
Assistant Attorney General.

APPENDIX.

AN ACT imposing an annual license tax upon every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits known as whisky or brandy or other species of double stamp spirits in this State, and upon every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in the State, and in removing same therefrom for the purpose of sale, or for any other purpose; providing for monthly reports by distilleries and bonded warehousemen, for the purpose of ascertaining the amount of tax due; providing for monthly payments of the amount of license tax due; fixing a penalty for failure to make such monthly report and settlement; providing for the manner of distribution of the tax so collected; repealing all other license, franchise and excise taxes on the businesses covered by this Act, and declaring an emergency to exist.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

1. Every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits, known as whisky or brandy or other species of double stamp spirits, in this State; and every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in this State, and in removing same therefrom for the purpose of sale, or for any other purpose, shall pay an annual license tax to the Commonwealth of Kentucky of fifty cents on every proof gallon of said distilled spirits so manufactured or stored in a bonded

warehouse, or withdrawn from a bonded warehouse, or transferred therefrom under bond out of the Commonwealth of Kentucky.

2. Every corporation, association, partnership and individual owning, controlling or operating a bonded warehouse in this State, wherein distilled spirits known as whisky or brandy or other species of double stamp spirits are stored, shall, on or before the first day of June, 1920, on blanks furnished by the Auditor of Public Accounts, report to the Auditor of Public Accounts the total amount of such spirits stored in a bonded warehouse owned, controlled or operated by such corporation, association, partnership or individual; and shall make monthly reports to the Auditor of Public Accounts thereafter, which reports must be signed and sworn to by such person, or, in case of a corporation, association or partnership, by some officer or person authorized to make such oath. The first report provided for herein shall show the number of proof gallons of such spirits withdrawn from said warehouse from the date this Act becomes effective to the date of making such report; and each monthly report thereafter shall show the number of proof gallons placed in said bonded warehouse since the date of making the last preceding report, the number of proof gallons withdrawn or transferred since the date of making the last preceding monthly report, and the aggregate number of gallons on hand at the date such report is made. In all cases where such spirits are transferred under bond from one bonded warehouse in this Commonwealth to another, said report shall show the warehouse from which same has been transferred and the warehouse to which same has been transferred,

the quantity thereof and the serial number of each of the packages so transferred.

3. Every person, corporation, association or partnership operating, owning or controlling such bonded warehouses, shall, at the time said reports herein provided for are made, pay to the Auditor of Public Accounts the tax of fifty cents per proof gallon upon each proof gallon of such spirits removed from the bonded warehouse owned, controlled or operated by such person, corporation, association or partnership, or transferred under bond out of this State, up to the date of making such report; and for the purpose of securing the payment of the license taxes herein provided for, the Commonwealth shall have a lien on all such spirits stored in such bonded warehouses, together with the other property of the bonded warehousemen used in connection therewith; and in all cases where the spirits so removed or transferred were owned or controlled by another than the bonded warehousemen, then the bonded warehouseman shall collect and pay the tax due on such spirits so removed or transferred under bond, and shall be subrogated to the lien of the Commonwealth.

4. Every corporation, association, partnership and individual engaged in distilling spirits, known as whisky or brandy or other species of double stamp spirits in this State, shall pay the license tax herein provided upon all such spirits so manufactured and removed from the premises without being placed in a bonded warehouse at the date of the removal of such spirits; and all such corporations, associations, partnerships and individuals engaged in the business of distilling such spirits in this State shall file month-

ly statements with the Auditor of Public Accounts, on blanks to be furnished by the Auditor, which statements must be sworn to and which statements shall show the number of proof gallons of such spirits so distilled and removed from the premises without having been stored in a bonded warehouse, and at the time of filing such statements shall pay to the Auditor of Public Accounts the amount due on such spirits so manufactured and removed; and for the payment of the taxes due under this provision, the Commonwealth shall have a lien upon all the machinery and the premises and the manufactured spirits made thereon, of the corporation, association, partnership or individual engaged in such distilling business.

5. Every person, corporation, association or partnership failing to make the reports herein provided for, in the manner herein provided for, and failing to pay the taxes as they become due, as herein provided for, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than five hundred dollars nor more than one thousand dollars, and each day after the date such report is due that such person, corporation, association or partnership is in default shall be treated and considered as a separate offense.

6. The tax herein provided for, when collected, shall be distributed as follows: To the State Road Fund, sixty-five per cent thereof; to the General Expenditure Fund, thirty-five per cent thereof.

7. The license tax herein imposed shall be in lieu of all other license, franchise or excise taxes now imposed by law on persons, corporations, partnerships or associations engaged in business covered by this

Act; and all Acts in conflict therewith are hereby repealed, and especially there is hereby repealed Chapter 5 of the Acts of the Special 1917 Session of the General Assembly of Kentucky.

8. Whereas, many persons, corporations, associations and partnerships are now engaged in the business covered and licensed by this Act, without paying an adequate license tax to the Commonwealth of Kentucky therefor; and whereas, the liquor which they are handling and in which they are dealing is constantly in large quantities being removed from the bonded warehouses and disposed of, without the State securing an adequate license tax thereon, an emergency is hereby declared to exist, and this Act shall take effect from and after the date of its passage and approval by the Governor.